



**Australian
Competition &
Consumer
Commission**

Our Ref: C2008/269
Your Ref: **Matter 81319642**
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8 April 2008

Mr Richard Lilly
Senior Associate
Freehills
GPO Box U1942
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By Email: Richard.Lilly@freehills.com

Dear Mr Lilly

**CEMEX Australia Pty Limited application for revocation and substitution A91082 –
opportunity for response to submissions**

I refer to the application for revocation and substitution lodged by CEMEX Australia Pty Limited (**CEMEX**) on 8 February 2008.

As you would be aware, the Australian Competition and Consumer Commission (**ACCC**) recently conducted interested party consultation in relation to the application. A number of submissions were made by owner drivers operating under the Equal Opportunity of Trips System, as well as competitors in the premixed concrete cartage market in Perth, Western Australia. Submissions made to the **ACCC** were on a confidential basis and for this reason have not been placed on the **ACCC**'s public register.

In order to provide CEMEX with an opportunity respond to these submissions prior to the **ACCC** releasing its draft determination, I have attached an outline of the submissions made by owner drivers and competitors in relation to CEMEX's public benefit claims (**Attachment A**).

Should CEMEX wish to reply to these submissions, I would appreciate your response by no later than **Friday, 18 April 2008**.

A copy of this letter has been placed on the **ACCC**'s public register.

Should you have any queries in relation to this matter, please do not hesitate to contact Rohan Connor on (02) 6243 1354.

Yours sincerely

A handwritten signature in black ink, appearing to read 'D Hatfield', written in a cursive style.

David Hatfield
A/g General Manager
Adjudication Branch

Submissions made by Lorry Owner Drivers (LODs) and competitors in response to application for authorisation by CEMEX Australia Pty Ltd

The ACCC has spoken to a number of Lorry Owner Drivers (LODs) and competitors operating in the premixed concrete cartage market in Perth, Western Australia, who commented on the application for authorisation by CEMEX Australia Pty Ltd. Interested party submissions can be summarised as follows.

1. Improved efficiency of operations

LODs submit that, aside from the size of a concrete truck, they are unable to determine the amount of concrete carted at any one time. The amount of concrete and distance travelled is determined by a number of factors, including the nature and location of a job. As such, a LOD is unable to make a material impact on the amount of concrete carted or distance over which that concrete is carted.

LODs submit that CEMEX uses standard form contracts when engaging LODs. As a result, LODs claim that they have limited capacity to exercise discretion when negotiating contract terms or cartage utilisation rates. Some LODs claimed that the utilisation rate has not been increased in a significant amount of time and this demonstrates that LODs have minimal input into the negotiation of contracts.

Competitors in the concrete cartage market in Perth, Western Australia indicated that standard form contracts are generally commonplace amongst LODs.

2. Improved industrial harmony

LODs largely expressed support for the continued operation of the Equal Opportunity of Trips System (**EOT System**).

However, LODs raised a number of concerns which were impacting upon their confidence in the transparency and fairness of the system. These concerns may have implications for industrial harmony in the future and as a result, may impact on the level of public benefit associated with authorisation of the EOT System.

EOT margin

LODs expressed a range of opinions about the current EOT Margin, as well as its impact upon business viability. In particular, a number of LODs indicated that the current margin is ± 5 per cent, while others believed it had been operating at ± 10 per cent for some time. Despite these differences, however, all LODs indicated that any significant change to the EOT Margin would reduce the level of parity in workload and therefore have potential adverse effects for business sustainability. All LODs contacted by the ACCC were strongly opposed to a change in the EOT Margin, to ± 10 per cent or otherwise, for this reason.

Monthly equalisation of workload

LODs submit that whereas the EOT was calculated on a monthly basis, it is now calculated in an ad hoc manner and infrequently. For example, the last EOT calculation appears to have been completed over four months ago. This delay in calculation of the EOT has resulted in some LODs having to work up to 12-14 hours per day to meet fleet average. LODs indicated that fluctuations in workload have led to driver fatigue and negatively impacted on cash flow management.

Calculation of trips and points

LODs indicated that the calculation of points under the EOT System no longer takes account of load size and distance carted. Rather, LODs are awarded points for the number of *trips* undertaken. Some LODs claimed that without equalisation of load size and distance, they cannot be satisfied that they have received an equal allocation of work.

Company trucks

A number of LODs indicated that they sought agreement to purchase and operate eight wheeler trucks, instead of their current six wheelers, under the EOT System. LODs claimed that CEMEX had denied these requests. Some LODs indicated that the disparity in capacity between company and LOD trucks has been a source of disharmony.

A number of LODs submit that although company trucks operate under the EOT System, points are shifted between company trucks at different locations to take account of workloads. For example, a company truck working at a slow plant may shift its unutilised points to a company truck working at a busy plant. LODs are not afforded this opportunity. LODs indicated that this allows company trucks to take advantage of larger jobs at the expense of LODs.

3. More effective input into contracts

LODs noted, similar to 1 above, that CEMEX generally uses standard form contracts which limit the ability of LODs to have any significant impact on contract negotiations.

4. Environmental benefits

LODs widely reject environmental benefits as a public benefit of the EOT System. In particular, LODs indicated that the frequency of washing agitators is not impacted by the operation of the EOT System and in any event, water for washing agitators is continually recycled.

LODs submit that as the distance of a trip is ultimately dependent on the location of a job, the EOT System has no material impact on the distance a LOD travels to a job.

5. Public safety benefits

LODs indicated that they would continue to abide by speed limits regardless of whether the EOT System continued to operate. In support of this claim, LODs noted that they would be concerned about having their driver's licence suspended whether they were operating under the EOT System or not. Ultimately, a LOD could not operate their business without a valid driver's licence.